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11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE DISTRICT OF OREGON

13 RODNEY D. ENGLERT,

Civil No. 05-1863-AA  
OPINION AND ORDER

14 Plaintiff,

15 vs.

16 HERBERT LEON MACDONELL, TERRY  
17 L. LABER, BARTON P. EPSTEIN,  
18 PETER R. DE FOREST, STUART H.  
JAMES, and PATRICIA LOUGH,

19 Defendants.

20 \_\_\_\_\_  
21 Helen C. Thompkins  
22 Law Office of Helen Thompkins PC  
333 S. State Street, Suite V 121  
Lake Oswego, OR 97034  
Attorney for plaintiff

23 Eric Neiman  
24 Heather J. Van Meter  
25 Williams Kastner & Gibbs, PLLC  
888 S.W. Fifth Ave., Suite 600  
Portland, OR 97204  
26 Attorney for Herbert  
MacDonell

27 AIKEN, Chief Judge:

28 Plaintiff Rodney D. Englert filed a complaint for

1       defamation and libel against several people including defendant  
2       Herbert MacDonell. Defendants then filed a special motion to  
3       strike based on Oregon's "Anti-SLAPP" (strategic litigation  
4       against public participation) law, O.R.S. §§ 31.150-31.155. On  
5       May 10, 2006, this court granted in part and denied in part the  
6       Anti-SLAPP motion dismissing several defendants. The parties  
7       then engaged in numerous discussions and settlement conferences  
8       in an attempt to resolve this case. Defendant MacDonell now  
9       moves for summary judgment. That motion is granted and this  
10      case is dismissed.

#### 11                               BACKGROUND

12           The parties are very familiar with the background of this  
13      case. Moreover, the May 10, 2006, opinion of this court set  
14      out an extensive factual background, therefore, most of it will  
15      not be repeated here.

16           In Englert's defamation action against MacDonell, he  
17      alleges the American Academy of Forensic Science ("AAFS")  
18      ethics complaint, filed against Englert, included information  
19      provided by MacDonell, among others. This court found in 2006,  
20      and finds again after a detailed review of the record, that  
21      MacDonell did not sign the defendants' AAFS submission, nor  
22      does the record include any affidavits submitted by MacDonell  
23      in support of the defendants' ethics complaints. I find  
24      nothing in the record to support MacDonell's involvement or  
25      participation in the ethics complaint.

26           Englert does, however, provide a series of letters  
27      authored by MacDonell beginning in 1993 accusing Englert of  
28      being a "Frankenstein monster," "forensic whore," "liar for

1 hire," and a "charlatan" relating to his work as a blood  
2 spatter expert.

3 Further, the brother of a murder victim, William Crank,  
4 states that in April 2000, MacDonell began an unsolicited  
5 conversation with him in which he attacked and criticized  
6 Englert, who had testified as an expert witness in Crank's  
7 sister's homicide trial.

8 Prosecuting Attorney Jim. J. Thomas in Blaine County,  
9 Idaho recounts a similar event in March 2005, in which  
10 MacDonell telephoned him to accuse Englert of perjury, saying  
11 that Englert would say anything in court if paid, and that  
12 MacDonell would do whatever he could to get Englert out of the  
13 forensic expert business. Around that same time, the Idaho  
14 Attorney General's Criminal Division in Boise notified Englert  
15 of documents left throughout the courthouse stating: "To whom  
16 it may concern - if you would be interested in Rod Englerts  
17 [sic] real background, training and credibility you should  
18 contact Herbert Leon MacDonell. . ."

19 Finally, a police sergeant in Huntington, West Virginia  
20 states that during a class MacDonell was teaching on blood  
21 patterns in Corning, New York, MacDonell called Englert a  
22 "charlatan," a "liar," and "untrustworthy."

23 In September 2005, Englert received notice of many of  
24 MacDonell's writings. Englert filed this action on November 3,  
25 2005, amending it November 9, 2005, to allege that defamatory  
26 statements by MacDonell (and others) were published and/or  
27 republished in Multnomah County, Oregon, bringing him into  
28 public contempt and ridicule, and diminished in the esteem,

1 respect, goodwill and confidence in which he had been held.

2 **STANDARDS**

3 Summary judgment is appropriate "if the pleadings,  
4 depositions, answers to interrogatories, and admissions on  
5 file, together with the affidavits, if any, show that there is  
6 no genuine issue as to any material fact and that the moving  
7 party is entitled to a judgment as a matter of law." Fed. R.  
8 Civ. P. 56©. Substantive law on an issue determines the  
9 materiality of a fact. T.W. Electrical Service, Inc. v.  
10 Pacific Electrical Contractors Assoc., 809 F.2d 626, 630 (9<sup>th</sup>  
11 Cir. 1987). Whether the evidence is such that a reasonable  
12 jury could return a verdict for the nonmoving party determines  
13 the authenticity of a dispute. Anderson v. Liberty Lobby,  
14 Inc., 477 U.S. 242, 248 (1986).

15 The moving party has the burden of establishing the  
16 absence of a genuine issue of material fact. Celotex Corp. v.  
17 Catrett, 477 U.S. 317, 323 (1986). If the moving party shows  
18 the absence of a genuine issue of material fact, the nonmoving  
19 party must go beyond the pleadings and identify facts which  
20 show a genuine issue for trial. Id. at 324.

21 Special rules of construction apply when evaluating  
22 summary judgment motions: (1) all reasonable doubts as to the  
23 existence of genuine issues of material fact should be resolved  
24 against the moving party; and (2) all inferences to be drawn  
25 from the underlying facts must be viewed in the light most  
26 favorable to the nonmoving party. T.W. Electrical, 809 F.2d at  
27 630.

## DISCUSSION

### Statute of Limitations

MacDonell seems to argue for a second time that Englert's claims fall outside the one year statute of limitations under O.R.S. 12.120(2). In his initial motion to dismiss, MacDonell asserted this claim alleging that Englert relied only on a 1993 letter MacDonell admits having written. Englert's response, however, then clarified that additional incidents were at issue. Englert provided affidavits demonstrating MacDonell made defamatory communications within a year of Englert filing his lawsuit (November 3, 2005). Further, under Oregon's discovery rule, a claim for defamation based on statements made in confidential documents does not accrue until plaintiff discovers its contents. Holdner v. Oregon Trout, 173 Or. App. 344, 351, 22 P.3d 244 (2001) (citing White v. Gurnsey, 48 Or. App. 931, 935-36, 618 P.2d 975 (1980)). Thus, as I ruled earlier, Englert's September 2005 discovery of MacDonell's older confidential communications falls within the statute of limitations under the discovery rule. Any claim by MacDonell regarding the statute of limitations is denied.

### Defamation

A claim for defamation requires the plaintiff to present evidence establishing that the defendant published a defamatory statement about the plaintiff to a third person. Affolter v. Baugh Construction Oregon, 183 Or.App. 198, 202, 51 P.3d 642 (2002). "A defamatory statement is one that would subject another to 'hatred, contempt or ridicule . . . [or] tend to diminish the esteem, respect, goodwill or confidence in which

1 [the other] is held or to excite adverse, derogatory or  
2 unpleasant feelings or opinions against [the other].'" Id.  
3 (internal citation omitted). "Whether a statement is capable  
4 of having a defamatory meaning is a question of law for the  
5 court." Simpson v Burrows, 90 F.Supp.2d 1108, 1126 (D. Or.  
6 2000).

7 An allegedly defamatory statement must contain some  
8 factual assertion that is capable of being proven true or  
9 false. Reesman v. Highfill 327 Or. 597, 603, 965 P.2d 1030  
10 (1998). Opinion statements are not provably true or false and  
11 are therefore not capable of a defamatory meaning. Id. at 606.  
12 Similarly, for purposes of the First Amendment, "[t]he scope of  
13 constitutional protection extends to statements of opinion on  
14 matters of public concern that do not contain or imply a  
15 provable factual assertion." Underwager v. Channel 9  
16 Australia, 69 F.3d 361, 366 (9<sup>th</sup> Cir. 1995). Slurs or name-  
17 calling are considered opinion statements. See Simpson, 90  
18 F.Supp.2d at 1126 ("a pervert, degenerate, or an immoral  
19 person," although rude and mean, were only rhetoric and "not  
20 the kind of ascertainable factual statements required to  
21 sustain a defamation claim.").

22 Englert's claim again MacDonell is based on the following  
23 communications: (1) a 1993 letter to a Utah attorney; (2) a  
24 1994 letter to a North Carolina attorney; (3) a 1998 affidavit  
25 signed by MacDonell and sent to a Washington prosecutor; (4)  
26 portions of a 1999 email to a Alabama forensic scientist; (5)  
27 an affidavit signed by William Crank regarding an April 2000  
28 statement; (6) a 2000 letter addressed "to whom it may

1 concern;" (7) a June 2003 email to a New York attorney; (8) an  
2 October 2003 email to a Washington attorney; (9) an unsigned  
3 message posted in an Idaho courthouse; (10) an affidavit signed  
4 by Jim J. Thomas about a March 2005 statement; (11) an  
5 affidavit signed by David J. Castle about a September 2005  
6 statement; and (12) a 2006 Indiana newspaper article. The  
7 court will review each of these twelve pieces of evidence in  
8 turn as possible support for Englert's defamation claim.

9 The 1993 letter to a Utah attorney, and 1994 letter to a  
10 North Carolina attorney do not contain any statements that  
11 constitute defamation, i.e. probable false assertions. The  
12 letters contain only statements of opinion. Regarding the 1999  
13 partial email, I find no defamatory statements. In fact, it is  
14 difficult to discern much information about the email without  
15 the context of the remainder of the email. Regarding the Crank  
16 Affidavit, I find no defamatory statement, particularly  
17 considering it is difficult to discern any MacDonell statements  
18 whatsoever from the affidavit. With respect to the 2000 letter  
19 addressed "to whom it may concern," it does not contain any  
20 statements that constitute defamation. Regarding the June 2003  
21 email to the New York attorney, and the October 2003 email to  
22 the Washington attorney, neither email contains any statements  
23 that constitute defamation. Regarding the message in the Idaho  
24 courthouse by an unknown author, plaintiff has no evidence or  
25 information to prove that MacDonell authored or posted the  
26 unsigned message in an Idaho courthouse. MacDonell states that  
27 he was not in Idaho at the time the message was posted and has  
28 no information as to who created the document or how it got to

1 a courtroom in Idaho. Nevertheless, even assuming the document  
2 was authored by MacDonell, it contains no statements that would  
3 constitute defamation. With respect to the Jim J. Thomas  
4 affidavit, it contains no quotes of statements by MacDonell  
5 that constitute defamation. Regarding the Castle affidavit,  
6 first there is no evidence that MacDonell actually made those  
7 statements, and second, to the extent that MacDonell made those  
8 statements, the opinion statements found within are not  
9 defamatory. Finally, regarding the 2006 Indiana newspaper  
10 article, MacDonell is not quoted in the article, nor does  
11 Englert have any information or evidence that the reporter ever  
12 talked to or obtained a quote from MacDonell. I find no  
13 evidence that MacDonell spoke to the reporter or caused any  
14 statement by him to be published or republished in the article.  
15 Moreover, Englert never requested the newspaper print a  
16 retraction. Or. Rev. Stat. 31.210 prohibits plaintiff from  
17 recovering damages without first requesting a retraction from  
18 the newspaper.

19 Further, based on the record, the court finds that  
20 plaintiff is a public figure. As a public figure, plaintiff  
21 must prove that MacDonell acted with actual malice in making  
22 any statements about Englert. 'Actual malice' is defined as  
23 making statements with knowledge, or reckless disregard, of  
24 their falsity. New York Times v. Sullivan, 376 U.S. 254, 280  
25 (1987); and Flowers v. Carville, 310 F.3d 1118, 1129 (9<sup>th</sup> Cir.  
26 2002). Plaintiff has no evidence of any actual malice by  
27 MacDonell. Plaintiff fails to point to a single alleged  
28 factual statement by MacDonell that plaintiff demonstrates is



1 false, or made with knowledge or reckless disregard of its  
2 falsity. I find no evidence in the record that MacDonell's  
3 statements were false factual assertions made with actual  
4 malice.

5 Finally, Englert has no evidence that he was damaged by  
6 any of these twelve items. Englert testified that the ethics  
7 complaint caused him to lose work on four cases (one case each  
8 in New York, Hawaii, Arizona and Wisconsin). Englert agrees  
9 that MacDonell did not submit an ethics complaint and was not  
10 involved in the ethics proceeding. Since Englert's only damage  
11 was lost work on four cases due to the filing of the ethics  
12 complaint that MacDonell had no part of, plaintiff has failed  
13 to identify any damages attributable to MacDonell.

14 None of the twelve documents at issue support plaintiff's  
15 claim of defamation against MacDonell. Therefore, MacDonell is  
16 entitled to summary judgment.

17 **CONCLUSION**

18 MacDonell's Motion for Summary Judgment (doc. 117) is  
19 granted. The parties' request for oral argument is denied as  
20 unnecessary.

21 IT IS SO ORDERED.

22 Dated this 6 day of July 2010.

23  
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25  
26 /s/ Ann Aiken

Ann Aiken

27 United States District Judge  
28